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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 CURTIS SHANE THOMPSON

10 Plaintiff,

11 v.

12 JOHN T. HICKS, *et al.*,

13 Defendants.

Case No. C08-1065-TSZ-JPD

REPORT AND RECOMMENDATION

14 INTRODUCTION AND SUMMARY CONCLUSION

15 This is a civil rights action proceeding under 42 U.S.C. § 1983. Plaintiff Curtis  
16 Thompson is a state prisoner who is currently confined at the Clallam Bay Corrections Center in  
17 Clallam Bay, Washington. He filed this action while confined at the King County Correctional  
18 Facility (“KCCF”) in Seattle, Washington. The lone claim remaining in this action is plaintiff’s  
19 claim that Benjamin Sanders, M.D., Medical Director of King County's Jail Health Services  
20 (“JHS”), was deliberately indifferent to plaintiff's serious medical condition while he was  
21 confined at KCCF.

22 Dr. Sanders has filed a motion for summary judgment seeking dismissal of plaintiff’s  
23 deliberate indifference claim. Plaintiff as filed a response opposing defendant’s summary

REPORT AND RECOMMENDATION - 1

1 judgment motion and defendant has filed a reply in support of his motion.<sup>1</sup> Also pending before  
2 the Court at this time is plaintiff's motion for reconsideration of the Court's prior order denying  
3 plaintiff's motion to amend his complaint. The Court, having reviewed the parties' pending  
4 motions, and the balance of the record, concludes that defendant's motion for summary judgment  
5 should be granted, plaintiff's motion for reconsideration should be denied, and plaintiff's third  
6 amended complaint and this action should be dismissed with prejudice.

### 7 BACKGROUND

8 Plaintiff Curtis Thompson was confined at KCCF between August 2004 and July 2009  
9 while awaiting trial on criminal charges. (Dkt. 159 at 2.) Beginning in August 2007, and  
10 continuing through July 2008, plaintiff complained of various skin conditions for which he  
11 received treatment from JHS personnel. (*See id.*) On August 12, 2007, plaintiff complained at  
12 triage that he was breaking out with acne, that he had dandruff, and that the nails and skin on his  
13 hands were peeling. (Dkt. 159 at 2 and Ex. 1 at 2.) The nurse observed some pimples on  
14 plaintiff's face and back, noted that the skin on plaintiff's palm was peeling and that his nails  
15 were very thick and down to the middle of the nail bed, and referred plaintiff to the clinic. (*Id.*)  
16 Shortly thereafter, on August 16, 2007, plaintiff reported to JHS personnel that a medication he  
17 had been prescribed for anxiety was causing itching to his face and scalp, and a generalized body  
18 rash, and he refused to take the medication any longer. (*See* Dkt. 159 at 2 and Ex. 1 at 3-5.)

19 Entries in plaintiff's medical records on August 22, 2007 and August 23, 2007 noted  
20 plaintiff's complaints of scalp lesions and a rash, and indicated that an appointment with a  
21 medical provider had been scheduled for August 28, 2007. (*Id.*, Ex. 1 at 6-7.) Plaintiff was seen  
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23 <sup>1</sup> Plaintiff identified his response as a cross-motion for summary judgment but because it was filed after the dispositive motion filing deadline had passed, the Court construes plaintiff's cross-motion as a response to defendant's motion for summary judgment rather than as a separate summary judgment motion.

1 by A.R.N.P. Catherine Schroeder on August 28 to address his complaints concerning scalp  
2 lesions. (Dkt. 159 at 2 and Ex. 1 at 9.) Plaintiff reported that the sores on his scalp appeared a  
3 month prior after he shaved his hair short, and that they were not itchy but they did weep and  
4 crust-over. (*Id.*) Upon examination, A.R.N.P. Schroeder noted small crusted lesions on  
5 plaintiff's scalp, but no head lice, skin redness, or swelling. (*See id.*) She assessed plaintiff's  
6 condition as likely staphylococcal ("staph") dermatitis and prescribed a seven-day course of an  
7 antibiotic, Septra, which is used to treat infections caused by bacteria. (*Id.* at 3 and Ex. 1 at 9,  
8 11.)

9 Plaintiff demanded during his August 28, 2007 interaction with A.R.N.P. Schroeder that  
10 his finger nails be treated for a fungal infection and he became abusive when she explained that  
11 such treatment was not offered in jail. (*Id.*, Ex. 1 at 9.) Three days later, on August 31, 2007,  
12 plaintiff was seen in triage for complaints of fungal infection on his finger and toe nails, and for  
13 infection on his scalp. (*Id.*, Ex. 1 at 13.) It appears that the nurse who assessed plaintiff  
14 observed no signs of infection on plaintiff's scalp, but observed discolored/deformed finger and  
15 toe nails which she assessed as a probable fungal infection. (*Id.*, Ex. 1 at 13-14.) The nurse  
16 thereafter discussed plaintiff's nail problem with a provider who advised that fungal infections  
17 were not treated due to a risk of liver toxicity. (*Id.*) Plaintiff was instructed to notify medical  
18 staff if the nail areas became red or swollen. (*Id.*)

19 On November 9, 2007, plaintiff was seen in triage for complaints of infections on his  
20 scalp and arms. (*Id.*, Ex. 1 at 15.) A JHS nurse examined plaintiff through his cell door and  
21 could not see any lesions, but she set up a medical appointment for plaintiff at his insistence.  
22 (*Id.*, Ex. 1 at 15-16.) On January 4, 2008, plaintiff was seen by A.R.N.P. Debra Beckman for  
23 evaluation of his complaint of scalp lesions which had first been treated the prior August, but

1 which had not resolved. (Dkt. 159, Ex. 1 at 17.) Upon examination, A.R.N.P. Beckman noted  
2 that plaintiff was in no apparent distress and that he had small crusted lesions on his scalp. (*Id.*)  
3 A.R.N.P. Beckman observed no swelling or thickening of the lesions, nor any nits, lice, or  
4 patches of baldness. (*Id.*) She assessed plaintiff's condition as an infected scalp rash and staph  
5 aureus, and she prescribed Doxycycline Hyclate, an antibiotic used to treat bacterial infections,  
6 and Selenium Sulfide ("Selsun"), a medication used on the scalp to control symptoms of  
7 dandruff and dermatitis. (*Id.* at 3 and Ex. 1 at 17-21.)

8 On February 5, 2008, and again on February 17, 2008, plaintiff submitted medical notes  
9 indicating that he still had infections on his scalp, hands, feet and arms, and that the antibiotics  
10 had not cleared them up. (*Id.*, Ex. 1 at 24-27.) Plaintiff was seen in triage on February 17, 2008  
11 at which time plaintiff complained to the nurse that the bacterial infection affecting his skin  
12 made it feel like he was being "eaten away." (*Id.*, Ex. 1 at 28.) A JHS nurse observed plaintiff  
13 through his cell door and was able to see only some red marks on plaintiff's skin. (*Id.*) The  
14 nurse referred plaintiff to a medical provider for evaluation of plaintiff's complaints of a skin  
15 infection. (*Id.*, Ex. 1 at 28-29.)

16 On February 22, 2008, plaintiff was seen by Gordon Raskin, M.D., for his complaints of  
17 a recurrent rash on his arms and scalp. (*Id.*, Ex. 1 at 30.) Plaintiff reported to Dr. Raskin that he  
18 had had a similar rash 1 to 2 months prior which had responded to a second course of antibiotics,  
19 and he asked that the prescription for antibiotics be refilled. (*Id.*) Upon examination, Dr. Raskin  
20 noted that plaintiff had some yellowish crust on his scalp and pustular lesions on both arms that  
21 were not actively draining. (*Id.*) Dr. Raskin assessed plaintiff's condition as  
22 "Cellulitis/Abscesses – likely due to MRSA" and prescribed Selenium Sulfide and scheduled a  
23 follow-up appointment to re-check plaintiff's skin eruptions. (*Id.*, Ex. 1 at 31-33.)

1 Dr. Sanders subsequently reviewed Dr. Raskin's notes of his appointment with plaintiff  
2 and, on February 25, 2008, Dr. Sanders initiated a two-week course of the antibiotic Doxycycline  
3 to treat plaintiff's cellulitis. (Dkt. 159, Ex. 1 at 35-38.) Plaintiff had a follow-up appointment  
4 with Dr. Raskin on March 3, 2008, at which time he requested a cream for itchy round patches  
5 on his arms and itchy crusts on his scalp. (*Id.*, Ex. 1 at 40.) Dr. Raskin questioned whether  
6 plaintiff could be developing a fungal infection because of repeat courses of antibiotics, and he  
7 prescribed a two-week course of Ketoconazole, an anti-fungal medication used to kill fungus  
8 growing on the skin. (*See id.* at 4 and Ex. 1 at 41-46.)

9 On March 8, 2008, plaintiff submitted a medical kite stating that he needed to continue  
10 treatment with the antibacterial lotion, shampoo, and antibiotics until his skin problems healed.  
11 (*Id.*, Ex. 1 at 47.) Plaintiff was advised that prescriptions for the shampoo and cream had already  
12 been written, and that his course of antibiotics had been completed. (*Id.*) Plaintiff submitted  
13 another kite on March 11, 2008, stating that his skin problems had not resolved and asking why  
14 he wasn't being kept on antibiotics and cortisone cream. (*Id.*, Ex. 1 at 49.) Plaintiff was seen in  
15 triage the following day and he stated at that time that he believed his scalp infection was from  
16 the barber's scissors and that antibiotics had previously worked to clear up such infections. (*See*  
17 *id.*, Ex. 1 at 51.) The JHS nurse attempted to see the area on plaintiff's scalp that he was  
18 concerned about, but was unsuccessful. (*Id.*) She referred plaintiff to a medical provider for  
19 evaluation of the need for a different treatment for plaintiff's scalp irritation. (*Id.*)

20 On March 19, 2008, plaintiff submitted another medical kite complaining that he still had  
21 an "internal bacterial infection (MRSA)" on his scalp, and that the "short treatments" he had  
22 been receiving were making the infection more resistant. (*Id.*, Ex. 1 at 54.) Plaintiff also  
23 requested in his kite that he be given cortisone cream for the eczema on his arms. (*Id.*) Plaintiff

1 was seen by Dr. Raskin on March 20, 2008 for a re-check of his dermatitis. (Dkt. 159, Ex. 1 at  
2 55.) At that time, plaintiff had a “diffuse reddish rash” on both of his arms and he was  
3 complaining of ongoing scalp lesions. (*Id.*) Plaintiff was adamant that he needed an antibiotic to  
4 “kill the internal bacteria.” (*Id.*) In his notes of the encounter with plaintiff, Dr. Raskin noted  
5 that when plaintiff was last seen, the rash on his arms was fading and improving slightly, but that  
6 it had become redder with raised, darker borders. (*Id.*) Dr. Raskin noted no obvious scalp  
7 lesions, scabbing or scaling. (*Id.*, Ex. 1 at 56.) It appears that Dr. Raskin assessed plaintiff’s  
8 condition as dermatophytosis (ringworm), seborrheic dermatitis, and/or staph aureus. (*See id.*,  
9 Ex. 1 at 56-60.) Dr. Raskin renewed plaintiff’s prescription for Ketoconazole, started him on  
10 Selenium Sulfide, and scheduled him for a follow-up appointment in two weeks. (*See id.*)

11 On April 14, 2008, plaintiff was seen by A.R.N.P. Diane Edwards to follow-up on his  
12 arm rash. (*Id.*, Ex. 1 at 65.) A.R.N.P. Edwards observed plaintiff through the pass-through  
13 because of security concerns, and noted a few dry, flaking lesions on plaintiff’s scalp but no  
14 erythema or pustules. (*Id.*, Ex. 1 at 66.) She also noted that plaintiff had some patches of raised  
15 scaling skin on his arms with some whitish scale, but no other pigment changes. (*Id.*) Plaintiff  
16 had no rash on his chest, abdomen, or back. (*Id.*) A.R.N.P. Edwards assessed plaintiff’s  
17 condition as dermatitis and started him on Triamcinolone, a topical steroid, apparently because  
18 the previous anti-fungal cream had increased the itching without improving the rash. (*Id.*)  
19 A.R.N.P. Edwards determined that there was no indication at that time for the Ketoconazole  
20 shampoo, though she did not discontinue the prescription, and she also determined that there was  
21 no apparent indication for antibiotics despite plaintiff’s insistence that antibiotics were necessary  
22 to treat “internal bacteria.” (*Id.*, Ex. 1 at 66-68.)  
23

1 On June 19, 2008, plaintiff was seen by R.N. Cassandra Hermann on rounds in the  
2 administrative segregation unit. (Dkt. 159, Ex. 1 at 69.) Plaintiff reported at that time that he  
3 believed his MRSA was coming back on his neck. (*Id.*) The nurse noted that plaintiff had a  
4 scattered crusted pattern on the nape of his neck, but no open sores, discharge, redness, or  
5 swelling. (*Id.*) R.N. Hermann referred plaintiff to the clinic for further evaluation. (*Id.*)

6 On July 1, 2008, plaintiff was seen by Peter Gomas, M.D., for evaluation of his  
7 complaints of “internal infection” on his neck and in his body. (*Id.*, Ex. 1 at 70.) Plaintiff  
8 reported to Dr. Gomas that he had contracted MRSA a year previously from the prison barber,  
9 that he periodically developed small pimple-like lesions on his back and scalp, and that he  
10 believed the infection involved his nose. (*Id.*) Plaintiff reported no fever, chills, or large boils,  
11 and stated that he had never had lesions in his axilla (armpit) or groin. (*Id.*) He also reported  
12 that neither the anti-fungal cream nor the steroid cream had resulted in any improvement. (*Id.*)

13 Upon examination, Dr. Gomas observed some small lesions on plaintiff’s back, none of  
14 which were weeping, with only minimal surrounding redness. (*Id.*, Ex. 1 at 71.) Dr. Gomas  
15 assessed plaintiff’s condition as mild folliculitis (inflammation of hair follicles), likely staph, and  
16 advised plaintiff to keep the areas clean and dry. (*Id.*) Dr. Gomas also took cultures for  
17 MRSA from two open lesions on plaintiff’s back, and a separate culture from plaintiff’s nose.  
18 (*Id.*) A follow-up appointment was scheduled to review the results of the cultures and consider  
19 the appropriate treatment. (*Id.*)

20 On July 14, 2008, A.R.N.P. Catherine Schroeder reviewed the laboratory results of the  
21 cultures taken by Dr. Gomas. (*See id.*, Ex. 1 at 77-78.) The cultures grew only basic  
22 staphylococcal aureus, not MRSA, and A.R.N.P. Schroeder prescribed a 10 day course of  
23 Keflex, an antibiotic used to treat bacterial infections. (*See id.*, Ex. 1 at 72-73, 75-78.) A.R.N.P.

1 Schroeder also requested that nursing check plaintiff's neck lesions to see if they had healed and  
2 indicated that if the lesions had healed, the Keflex would be discontinued. (Dkt. 159, Ex. 1 at  
3 77.) The following day, R.N. Susan Embry evaluated plaintiff's lesions and noted multiple small  
4 red lesions over most of plaintiff's back, a few of which were scabbed. (*Id.*, Ex. 1 at 79.) She  
5 thereafter spoke with A.R.N.P. Schroeder about the appearance of the lesions and a decision was  
6 made to continue the Keflex. (*Id.*)

7 Plaintiff's medical records appear to indicate that he continued to receive Triamcinolone  
8 and Ketoconazole to treat dermatitis and ringworm through September 2, 2008. (*See* Dkt. 159 at  
9 7 and Ex. 1 at 80, 81.) Plaintiff apparently made no further complaints regarding skin conditions  
10 to JHS staff prior to his discharge from KCCF on July 17, 2009. (*See id.*)

#### 11 PROCEDURAL HISTORY

12 Plaintiff filed this civil rights action in July 2008 alleging that attorneys involved in his  
13 then pending criminal case had conspired to prevent him from conducting discovery and  
14 obtaining evidence and witnesses for his case, that he had been assaulted by guards at the King  
15 County Jail, and that medical staff at the King County Jail were deliberately indifferent to his  
16 medical needs after the alleged assaults. (*See* Dkt. 5 at 3.) Plaintiff was thereafter given multiple  
17 opportunities to amend his complaint in order to cure pleading deficiencies, and plaintiff filed  
18 three amended complaints. (*See* Dkts. 6, 7, 9, 13, 16 and 17.) Plaintiff's third amended  
19 complaint, filed January 15, 2009, is the operative complaint in this action. (Dkt. 17.)

20 Prior to service of the third amended complaint, the Court dismissed from this action all  
21 claims and defendants except for plaintiff's claims of excessive force alleged against four King  
22 County Jail employees: Sergeant Taylor, Sergeant Fasen, Corrections Officer Filipo, and  
23 Corrections Officer Clemons. (Dkt. 19.) The Court subsequently permitted plaintiff to amend



1 his complaint to add one more defendant implicated in plaintiff's excessive force claim, Sergeant  
2 Maude. (*See* Dkt. 27.) Though plaintiff was permitted to amend, no new pleading was  
3 submitted and the operative complaint remained the third amended complaint filed in January  
4 2009. (*See id.* at 2.) The Court specifically noted in its Order granting plaintiff leave to amend  
5 to add Sergeant Maude that no further motions for leave to amend would be granted. (*Id.*)

6 The case proceeded to trial on plaintiff's excessive force claims in 2012 and, on August 2,  
7 2012, a jury returned verdicts for the defendants. (*See* Dkts. 105 and 106.) Plaintiff thereafter  
8 filed an appeal in the United States Court of Appeals for the Ninth Circuit challenging the  
9 Court's dismissal of several claims for failure to state a claim, and the Court's Order allowing  
10 evidence at trial of plaintiff's prior bad acts and prior convictions. (*See* Dkts. 120 and 136 at 1.)  
11 The Ninth Circuit affirmed in part, and reversed and remanded in part. (*See* Dkt. 136.)  
12 Specifically, the Ninth Circuit concluded that this Court should not have dismissed plaintiff's  
13 § 1983 claim for deliberate indifferent to serious medical conditions and therefore reinstated that  
14 claim, but affirmed in all other respects. (*Id.*)

15 The Ninth Circuit outlined plaintiff's deliberate indifference claim as follows:

16 Thompson's multiple complaints alleged that he sent many requests for medical  
17 care to jail staff over a two-year period to treat painful "infections on [his] head  
18 and backside" and "finger and toenails" and that had jail staff responded to those  
19 requests, his condition could have been treated with an antibiotic or over-the-  
20 counter medication. Thompson also pled that B. Sanders, the jail's medical  
21 director, who presumably was responsible for triage, and other unknown John  
22 Does, were responsible for refusing to see and treat him. Those facts were  
23 sufficient to state a claim under § 1983.

(Dkt. 136 at 2.)

22 The Ninth Circuit issued its mandate on October 29, 2014, and the matter was  
23 subsequently referred to the undersigned for further proceedings. (Dkts. 138 and 142.) On

1 December 1, 2014, this Court issued an Order directing service on Dr. Benjamin Sanders, the  
2 only individual specifically identified in plaintiff's deliberate indifference claim. (Dkt. 143.)  
3 Days later, the Court received from plaintiff a motion seeking leave to amend and other relief.  
4 (Dkt. 144.) The Court denied the motion to amend because plaintiff failed to include with his  
5 motion a proposed amended complaint. (Dkt. 145.)

6 On April 20, 2015, the Court received from plaintiff a motion seeking leave to  
7 supplement/amend his claims and other relief. (Dkt. 153.) The Court denied that motion as well,  
8 again on the grounds that plaintiff failed to submit in conjunction with his motion a proposed  
9 amended complaint. (Dkt. 156.) On June 8, 2015, plaintiff filed a motion for reconsideration of  
10 the Order denying his motion for leave to amend and the motion was placed on the Court's  
11 calendar for consideration on June 26, 2015. (Dkt. 157.) On June 16, 2015, defendant Sanders  
12 filed a motion for summary judgment and, on June 17, 2015, defendant filed a response to  
13 plaintiff's motion for reconsideration. (Dkts. 158 and 162.) On July 1, 2015, plaintiff filed a  
14 cross-motion for summary judgment which defendant requests be treated as a response to his  
15 summary judgment motion rather than as a separate motion because it was filed after the June  
16 18, 2015 dispositive motion filing deadline. (*See* Dkts. 163 and 164.) This request seems  
17 appropriate and the Court has so construed plaintiff's cross-motion for summary judgment.

18 Plaintiff's motion for reconsideration and defendant's motion for summary judgment are  
19 now ripe for review and are properly considered together in this Report and Recommendation.

## 20 DISCUSSION

### 21 Motion for Summary Judgment

22 Summary judgment is appropriate when, viewing the evidence in the light most favorable  
23 to the nonmoving party, there exists "no genuine dispute as to any material fact" such that "the

1 movant is entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a); *Anderson v.*  
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are facts which might affect the  
3 outcome of the pending action under governing law. *See Anderson*, 477 U.S. at 248. Genuine  
4 disputes are those for which the evidence is such that “a reasonable jury could return a verdict  
5 for the nonmoving party.” *Anderson*, 477 U.S. at 248.

6 In response to a properly supported summary judgment motion, the nonmoving party  
7 may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts  
8 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
9 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of  
10 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on a  
11 motion for summary judgment, the court may not weigh the evidence or make credibility  
12 determinations. *Id.* at 248.

### 13 Section 1983 Standard

14 In order to sustain a cause of action under 42 U.S.C. § 1983, a plaintiff must show (i) that  
15 he suffered a violation of rights protected by the Constitution or created by federal statute, and  
16 (ii) that the violation was proximately caused by a person acting under color of state law. *See*  
17 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9<sup>th</sup> Cir. 1991). The causation requirement of § 1983 is  
18 satisfied only if a plaintiff demonstrates that a defendant did an affirmative act, participated in  
19 another's affirmative act, or omitted to perform an act which he was legally required to do that  
20 caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir. 1981)  
21 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9<sup>th</sup> Cir. 1978)).  
22  
23

Due Process: Inadequate Medical Care

The claim alleged by plaintiff in his third amended complaint, and reinstated by the Ninth Circuit, was that Dr. Sanders and other unknown members of the jail medical staff were deliberately indifferent to plaintiff's serious medical needs when they failed to respond to requests for medical care to treat painful skin infections which plaintiff identified as "MRSA," or to treat infections of his fingernails and toenails. (Dkt. 17 at 4-5. *See also*, Dkt. 136 at 2.)

Plaintiff maintains that there is an additional component to his deliberate indifferent claim; *i.e.*, that he was denied proper follow-up care for injuries sustained in an alleged assault in March 2008.<sup>2</sup> Defendant argues that this claim was not included in the Ninth Circuit's remand and should not be considered. While true that the Ninth Circuit did not expressly include this portion of plaintiff's deliberate indifference claim in its remand order, the Ninth Circuit did not expressly exclude the claim either. Given the lack of clarity by the Circuit, and the fact that plaintiff, in his various pleadings, consistently included his allegation regarding the lack of follow-up care in his deliberate indifference claim, this Court will address the claim.

It appears that plaintiff was a pretrial detainee at KCCF at times relevant to his complaint and, thus, his claim of inadequate medical care arises under the Due Process Clause of the Fourteenth Amendment. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996). The claim is nonetheless properly analyzed under Eighth Amendment standards. *See id.* In order to establish an Eighth Amendment violation, a prisoner must satisfy a two-part test containing both an objective and a subjective component. The Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation;

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<sup>2</sup> This alleged assault was the subject of plaintiff's excessive force claims which were rejected at trial.

1 and (2) the prison official acted with a sufficiently culpable state of mind. *Farmer v. Brennan*,  
2 511 U.S. 825, 834 (1994).

3 The objective component of an Eighth Amendment claim is "contextual and responsive  
4 to 'contemporary standards of decency.'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting  
5 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective  
6 component of the Eighth Amendment standard has been defined as "deliberate indifference" to  
7 an inmate's health or safety. *Farmer*, 511 U.S. at 834. Under the "deliberate indifference"  
8 standard, a prison official cannot be found liable for denying an inmate humane conditions of  
9 confinement unless the official knows of and disregards an excessive risk to inmate health or  
10 safety. *Id.* at 837.

11 The Ninth Circuit has explained that "[p]rison officials are deliberately indifferent to a  
12 prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical  
13 treatment." *Hallett v. Morgan*, 296 F.3d 732, 744 (9<sup>th</sup> Cir. 2002) (internal quotation marks  
14 omitted). "[A] serious medical need is present whenever the failure to treat a prisoner's  
15 condition could result in further significant injury or the unnecessary and wanton infliction of  
16 pain." *Clement v. Gomez*, 298 F.3d 898, 904 (9<sup>th</sup> Cir. 2002).

17 It is well established that a mere difference of opinion concerning proper medical care is  
18 not sufficient to establish deliberate indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9<sup>th</sup> Cir.  
19 1996) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). In order to prevail on an  
20 Eighth Amendment claim which involves choices between alternative courses of treatment, a  
21 plaintiff must show "that the course of treatment the doctors chose was medically unacceptable  
22 under the circumstances . . . and . . . that they chose this course in conscious disregard of an  
23 excessive risk to plaintiff's health." *Jackson*, 90 F.3d at 332 (citations omitted).

1 Defendant argues in his motion for summary judgment that plaintiff's allegations of  
2 deliberate indifference have no support in the record. This Court concurs.

3 ***1. Nail Fungus***

4 Plaintiff asserts in his third amended complaint that Dr. Sanders, and others, were  
5 deliberately indifferent to his serious medical needs when they failed to treat infections of his  
6 fingernails and toenails. (*See* Dkt. 17 at 4-5.) The record reflects that after plaintiff brought his  
7 concern regarding the condition of his nails to the attention of JHS staff in August 2007, he was  
8 assessed with a probable fungal infection of his fingernails and toenails and the decision was  
9 made not to treat the infection but, rather, to monitor the nails for acute infection. (*See* Dkt. 159,  
10 Ex. 1 at 2, 9, 13-14.) Dr. Sanders, in his declaration in support of his motion for summary  
11 judgment, explains that fungal infections of the nails are generally cosmetic, do not spread, and  
12 have no ill effects. (Dkt. 159 at 3.) Moreover, the medications used to treat such infections can  
13 be toxic to the liver and, thus, treatment for the condition is typically deferred absent signs of  
14 acute infection. (*See id.* and Ex. 1 at 13-14.)

15 Plaintiff fails to demonstrate that the fungal infection of his nails constituted a serious  
16 medical need or that defendant was, in any event, deliberately indifferent to the condition.  
17 Plaintiff's complaint regarding the failure of defendant to treat his fungal infection constitutes, at  
18 most, a difference of opinion as to the proper course of treatment and there is no evidence in the  
19 record that the course of treatment chosen was medically unacceptable. Accordingly, this  
20 portion of plaintiff's deliberate indifference claim fails.

21 ***2. Skin Infections***

22 Plaintiff also asserts in his third amended complaint that Dr. Sanders, and others, were  
23 deliberately indifferent to his serious medical needs when they failed to treat "infections on [his]

1 head & backside (MRSA)." (*See* Dkt. 17 at 4-5.) Plaintiff contends that these infections could  
2 have been treated with antibiotics or over-the-counter medications, but defendant failed to act.  
3 (*See id.*) Faced with the evidence submitted by defendant in support of his motion for summary  
4 judgment which demonstrates that members of the JHS staff did, in fact, respond to plaintiff's  
5 complaints regarding his skin infections, and repeatedly prescribed antibiotics and other  
6 medications to treat those conditions, plaintiff now acknowledges that he received treatment for  
7 his skin infections, but he maintains that the various treatments provided by JHS staff were not  
8 effective and that he eventually gave up pursuing treatment while at KCCF. (*See* Dkt. 163 at 2-3.)

9         The medical records provided by defendant in support of his summary judgment motion  
10 demonstrate that members of the JHS staff were generally responsive to plaintiff's complaints  
11 regarding his skin infections. Though there is no evidence in the record that JHS staff ever  
12 refused to see or treat plaintiff, it appears that the ability of JHS staff to assess plaintiff's  
13 condition may have been limited on occasion by the fact that plaintiff was an ultra-security  
14 inmate and such assessments had to be conducted through the cell door. This limitation appears  
15 to have resulted, on at least one occasion, in a delay in plaintiff receiving treatment.

16         Specifically, the medical records reflect that on November 9, 2007, plaintiff complained  
17 to a triage nurse of infections on his scalp and arms. (Dkt. 159, Ex. 1 at 15.) Plaintiff was seen  
18 through his cell door and the nurse reported seeing no lesions and conducting no other  
19 examination. (*Id.*) The nurse set up a medical clinic visit for plaintiff, but apparently only  
20 because he insisted that she do so. (*See id.*) The nurse assigned a low priority to the follow-up  
21 appointment and plaintiff was not seen in the clinic until January 4, 2008. (*See id.*, Ex. 1 at 15-  
22 17.)

1 At the January 4, 2008 appointment, plaintiff complained of scalp lesions which had not  
2 resolved since being treated with an antibiotic in August 2007. (Dkt. 159, Ex. 1 at 17.) Plaintiff  
3 was diagnosed with staph aureus and was prescribed a two week course of oral antibiotics and a  
4 topical anti-infective medication for his scalp. (*See id.*, Ex. 1 at 17-21.) While the delay in  
5 providing treatment on this occasion is concerning, there is no evidence in the record that the  
6 delay caused plaintiff any significant injury or unnecessary pain and, thus, the delay does not rise  
7 to the level of a constitutional violation.

8 Another notable delay, which plaintiff references in his response to defendant's summary  
9 judgment motion, was the delay in JHS staff performing a diagnostic culture of plaintiff's skin  
10 infection. There is insufficient information in the record for this Court to assess the exact point  
11 at which such testing might have been necessary and/or appropriate. However, the Court finds it  
12 noteworthy that Dr. Raskin, on February 22, 2008, assessed plaintiff with "Cellulitis/Abscesses –  
13 likely due to MRSA," and yet ordered no diagnostic cultures and prescribed nothing but a topical  
14 anti-infective even though plaintiff reported to him that oral antibiotics had previously been  
15 effective. (*Id.*, Ex. 1 at 30-34.)

16 Dr. Sanders subsequently reviewed Dr. Raskin's assessment, presumably in his role as  
17 medical director, and prescribed a 10 day course of oral antibiotics beginning on February 25,  
18 2008. (*Id.*, Ex. 1 at 36-38.) Dr. Sanders did not order any diagnostic cultures, but nothing in the  
19 record suggests that the failure to perform diagnostic cultures at that time resulted in any harm to  
20 plaintiff. And, in fact, when Dr. Gamatos finally took cultures in July 2008 to test for MRSA, no  
21 MRSA was detected. (*Id.*, Ex. 1 at 70-73, 77.) This fact reinforces the conclusion that the  
22 failure to conduct diagnostic testing earlier in the treatment process did not result in any  
23 significant harm.



1 Overall, though there were some questionable delays in providing plaintiff treatment, the  
2 evidence submitted by defendant in support of his summary judgment motion demonstrates that  
3 defendant and the JHS staff responded to plaintiff's concerns about his skin infections and  
4 provided him necessary and appropriate treatment.<sup>3</sup> Plaintiff offers no evidence to the contrary.  
5 Defendant is therefore entitled to judgment as a matter of law with respect to plaintiff's claim  
6 that he was deliberately indifferent to plaintiff's skin infections.<sup>4</sup>

### 7 **3. Follow-Up Care for Injuries**

8 Finally, plaintiff asserts in his third amended complaint that Dr. Sanders, and others, were  
9 deliberately indifferent to his serious medical needs when they failed to provide follow-up care  
10 for injuries sustained in an altercation with corrections officers in March 2008. (Dkt. 17 at 4-5.)  
11 The record reflects that the altercation with corrections officers occurred on March 13, 2008  
12 during which plaintiff hit his head and suffered a two inch laceration to the right side of his  
13 scalp. (See Dkt. 165, Ex. 1 at 1.) Plaintiff was evaluated by R.N. Carolyn Michels, who dressed  
14 plaintiff's wound, and plaintiff was then transported to Harborview Medical Center ("HMC") for  
15 further evaluation and treatment. (See *id.*)

16 At HMC, plaintiff was diagnosed with a scalp laceration and a fracture of the zygomatic  
17 arch. (*Id.*, Ex. 1 at 2-3.) The laceration was repaired using staples and plaintiff was prescribed

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18 <sup>3</sup> Plaintiff asserts in his response to defendant's summary judgment motion that he was never given the  
19 oral antibiotic Keflex which was prescribed for him in July 2008 after the diagnostic cultures confirmed that plaintiff  
20 was then suffering from a staph infection. (See Dkt. 163 at 2-3.) However, there is no evidence in the record to  
21 support this assertion. The medical records provided by defendant in support of his motion for summary judgment  
22 demonstrate that plaintiff received a 10 day course of the antibiotic with instructions that the medication be kept on  
23 plaintiff's person and be self-administered four times per day. (See Dkt. 159, Ex. 1 at 75-79.) Plaintiff's conclusory  
assertion that he didn't receive the drug is insufficient to preclude summary judgment.

<sup>4</sup> Plaintiff asks the Court to consider in support of his deliberate indifference claim a November 2007  
Department of Justice ("DOJ") report which found that the medical care provided at KCCF fell below the  
constitutionally required standard of care due to "inadequate prevention and treatment of communicable diseases,  
particularly skin infections and MRSA." (See Dkt. 81 at 22.) While the Court identified in plaintiff's medical record  
issues of concern similar to some of those raised in the DOJ report, the report simply does not establish that the care  
provided to *plaintiff* was constitutionally inadequate.

1 ibuprofen and acetaminophen for pain. (Dkt. 165, Ex. 1 at 4-5.) The treatment plan detailed by  
2 HMC included follow-up appointments with the craniofacial/burns/plastics and ophthalmology  
3 clinics, removal of the staples in 7-10 days, and daily dressing changes including application of  
4 antibacterial ointment. (*Id.*, Ex. 1 at 4.)

5 On March 14, 2008, Dr. Sanders reviewed the HMC Emergency Room record of  
6 plaintiff's visit and noted the diagnosis provided by HMC. (Dkt. 159, Ex. 1 at 52.) He further  
7 noted that transport slips had been completed for plaintiff's follow-up visits at the HMC specialty  
8 clinics, that medications had been prescribed for pain, and that the staples would need to be  
9 removed in 7 to 10 days. (*Id.*, Ex. 1 at 52-53.)

10 On March 21, 2008, Dr. Sanders reviewed information that he had received from the  
11 outside appointment scheduler who advised that plaintiff had refused to go to the plastic surgery  
12 appointment scheduled for that day. (Dkt. 165, Ex. 1 at 7.) Dr. Sanders noted that plaintiff had  
13 been "functionally intact" since returning from HMC and that a "signed informed refusal" to  
14 attend the appointment had been obtained. (*Id.*) He concluded that there was no acute need for  
15 further evaluation and that plaintiff could submit a kite "for follow-up or for symptoms." (*Id.*)

16 On March 22, 2008, plaintiff was seen by JHS R.N. Heidi Zanker for removal of his  
17 staples. (Dkt. 159, Ex. 1 at 61.) R.N. Zanker removed the staples but then noted that the wound  
18 appeared not to be closed enough. (*Id.*) She further noted that plaintiff would be re-checked the  
19 next day though there is no indication in plaintiff's medical records that this follow-up occurred.  
20 (*See id.*)

21 A note in plaintiff's medical records on March 24, 2008, reveals that plaintiff refused to  
22 go to his follow-up appointment at the HMC ophthalmology clinic, just as he had previously  
23 refused to attend his follow-up appointment at the HMC plastic surgery clinic. (Dkt. 159, Ex. 1

1 at 62.) Plaintiff was apparently then scheduled for a follow-up appointment with a JHS medical  
2 provider to discuss his refusal to attend his HMC appointments. (Dkt. 159, Ex. 1 at 62.) On  
3 April 2, 2008, A.R.N.P. Beckman contacted plaintiff to inquire about his refusal to go to his  
4 HMC appointments, and plaintiff advised that he was not refusing to go to HMC, he was only  
5 refusing to be taken by the guards whom he claimed caused his injuries. (Dkt. 165, Ex. 1 at 6.)  
6 A.R.N.P. Beckman explained to plaintiff that she was unable to arrange any alternate form of  
7 transportation for his HMC appointment and she advised that he go to his appointment when  
8 called. (*Id.*) A.R.N.P. Beckman noted that she would seek Dr. Sanders' advice regarding  
9 plaintiff's lack of follow-up at the ophthalmology and plastic surgery clinics. (*Id.*) There is no  
10 indication in plaintiff's medical records whether Dr. Sanders ever responded to A.R.N.P.  
11 Beckman's request for follow-up advice.

12         The medical records submitted by defendant in support of his summary judgment motion  
13 suggest that there may have been some gaps in the follow-up care plaintiff received for the  
14 injuries suffered on March 13, 2008, some attributable to JHS staff and some attributable to  
15 plaintiff himself. For example, nothing in the record indicates that JHS staff changed plaintiff's  
16 wound dressing daily, and applied antibacterial ointment, as recommended by the HMC  
17 provider. However, the lack of follow-up at the HMC specialty clinics, which appears to be  
18 plaintiff's primary complaint, was a direct result of plaintiff's refusal to attend those  
19 appointments. While plaintiff suggests that his refusal to return to HMC was warranted because  
20 of his fear of being assaulted, nothing in the record suggests that this fear was justified. And,

1 regardless of the apparent gaps in plaintiff's follow-up care, or the reasons for those gaps, there is  
2 no evidence in the record demonstrating that plaintiff suffered any additional harm as a result.<sup>5</sup>

3 In sum, plaintiff fails to demonstrate that any deficiencies in the follow-up treatment for  
4 his facial injuries violated constitutional standards. Accordingly, Dr. Sanders is entitled to  
5 judgment as a matter of law with respect to this final portion of plaintiff's deliberate indifference  
6 claim as well.

#### 7 Motion for Reconsideration

8 On May 26, 2015, this Court denied plaintiff's most recent motion to amend his  
9 complaint on the grounds that plaintiff failed to submit with his motion a proposed amended  
10 complaint. (Dkt. 156.) Plaintiff moves for reconsideration of this ruling, arguing that the Court  
11 misread or misunderstood his motion papers because he did, in fact, submit a proposed  
12 supplemental pleading with his motion. (Dkt. 157.)

13 Motions for reconsideration are disfavored and will be granted only in limited  
14 circumstances. The Court will ordinarily deny motions for reconsideration "in the absence of a  
15 showing of manifest error in the prior ruling or a showing of new facts or legal authority which  
16 could not have been brought to its attention earlier with reasonable diligence." LCR 7(h)(1).

17 A review of plaintiff's April 17, 2015 motion papers confirms that plaintiff did submit  
18 with his motion for leave to amend a document entitled "Proposed Supplemental –Amended  
19 Pleadings." (Dkt. 157-1.) While the proposed amended pleading was not presented in the  
20 preferred format, it was arguably sufficient to warrant more substantive review. Accordingly,  
21 this Court's basis for denying plaintiff's motion to amend was arguably incorrect. However, a  
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23 <sup>5</sup> The Court notes that during the period of time when plaintiff was recovering from his facial injuries, it appears that he actively sought treatment for his skin infections, but did not actively pursue any follow-up treatment for his facial injuries.

1 substantive review of plaintiff's proposed amended pleading satisfies this Court that denial of  
2 plaintiff's motion to amend is still appropriate for reasons that will be discussed below.

3 Rule 15(a) of the Federal Rules of Civil Procedure provides that the court should freely  
4 give leave to amend "when justice so requires." Five factors are typically considered when  
5 assessing the propriety of a motion for leave to amend: (1) bad faith; (2) undue delay; (3)  
6 prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has  
7 previously amended his complaint. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9<sup>th</sup> Cir. 2004).

8 Plaintiff, by way of his proposed supplemental/amended pleading, seeks to expand his  
9 deliberate indifference claim to include claims against King County, former jail director Reed  
10 Holtgeerts, and Dr. Sanders for knowingly permitting unsafe and unhealthy conditions of  
11 confinement at the King County Jail resulting in the transmission of MRSA and fungal  
12 infections. (Dkt. 153-1) He also seeks to add claims against King County and former director  
13 Holtgeerts for the alleged failure of the medical staff to treat those infections. (*Id.*) Plaintiff  
14 contends that the "custom or policy" of unsafe and/or unhealthy conditions of confinement, and  
15 the failure to provide treatment for infections arising out of those conditions, continues to affect  
16 inmates at the King County Jail and the Regional Justice Center and he seeks an injunction from  
17 this Court to ensure the jail facilities remain compliant with federal constitutional standards.

18 (*Id.*)

19 The Ninth Circuit remanded this case for consideration of a specific previously dismissed  
20 claim; *i.e.*, plaintiff's claim that Dr. Sanders and other JHS personnel were deliberately  
21 indifferent to his serious medical needs. (*See* Dkt. 136 at 2.) Plaintiff should not be permitted to  
22 take advantage of this remand to litigate new claims which, through the exercise of reasonable  
23 diligence, could have been asserted much earlier in this action. This is particularly so given that

1 plaintiff was provided multiple opportunities in the early stages of this case to amend his  
2 complaint and was advised several years ago that no further motions to amend would be granted.  
3 (*See* Dkt. 27.) Plaintiff had ample opportunity to assert claims regarding the conditions of his  
4 confinement at the outset of this action. It is many years too late for plaintiff to assert entirely  
5 new causes of action.

6 With respect to the claims asserted in his proposed amended complaint which arguably  
7 fall within the ambit of his deliberate indifference to medical care claim, plaintiff has simply not  
8 alleged sufficient facts to state a cause of action against former jail director Reed Holtgeerts or  
9 against King County arising out of the alleged deficiencies in the medical care provided plaintiff  
10 at KCCF. Moreover, because the evidence supplied to the Court in support of Dr. Sanders'  
11 summary judgment motion demonstrates no violation of plaintiff's federal constitutional rights  
12 relative to the medical care he received while confined at the King County Jail, it would serve no  
13 purpose to permit him to amend his complaint to assert the same claims against new defendants.  
14 For the foregoing reasons, plaintiff's motion for reconsideration of the Court's prior order  
15 denying him leave to amend his complaint should be denied.

#### 16 CONCLUSION

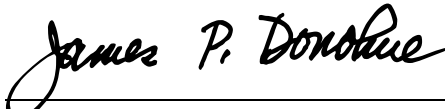
17 As plaintiff has not established any violation of his federal constitutional rights, this  
18 Court recommends that defendant's motion for summary judgment be granted, and that plaintiff's  
19 third amended complaint and this action be dismissed with prejudice. This Court further  
20 recommends that plaintiff's motion for reconsideration be denied as well. A proposed order  
21 accompanies this Report and Recommendation.

22 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
23 served upon all parties to this suit by no later than **September 2, 2015**. Failure to file objections

1 within the specified time may affect your right to appeal. Objections should be noted for  
2 consideration on the District Judge's motion calendar for the third Friday after they are filed.  
3 Responses to objections may be filed within **fourteen (14)** days after service of objections. If no  
4 timely objections are filed, the matter will be ready for consideration by the District Judge on  
5 **September 4, 2015.**

6 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
7 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
8 assigned District Judge acts on this Report and Recommendation.

9 DATED this 12th day of August, 2015.

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12 JAMES P. DONOHUE  
13 Chief United States Magistrate Judge  
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